

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILLIAM ODESSA BROWN II,) No. C 05-1423 CW (PR)
)
Plaintiff,) ORDER GRANTING DEFENDANTS'
) MOTION TO DISMISS AND
v.) ADDRESSING PENDING MOTIONS
)
SALINAS VALLEY STATE PRISON,) (Docket nos. 72, 82, 86)
et al.,)
Defendants.)
)

Plaintiff William Odessa Brown II, a state prisoner currently incarcerated at the Correctional Training Facility (CTF), filed this pro se civil rights action when he was incarcerated at Salinas Valley State Prison (SVSP). In an Order dated January 19, 2006, the Court granted Plaintiff's motion to proceed in forma pauperis and found that Plaintiff presented a cognizable claim of deliberate indifference to his safety. The Court dismissed Plaintiff's claims related to false charges, property loss, and the administrative appeals process. On April 21, 2006, the Court issued an order for service of Plaintiff's deliberate indifference claim. On June 20, 2006, Defendants filed their answer.

Before the Court is Defendants' motion pursuant to Federal Rules of Civil Procedure 12(b) to dismiss Plaintiff's complaint for failure to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a).¹ Plaintiff has filed an opposition, and

¹ Deputy Attorney General Sara Ugaz represents and has acknowledged service on behalf of Defendants Glenn and Godinez, who are the only Defendants moving for dismissal. Although in its April 21, 2006 Order the Court ordered the complaint to be served on Defendants Ramirez, Holmes, Allen, Ortiz, and Melrow, counsel states that to her knowledge none of them has been served.

1 Defendants have filed a reply. For the reasons discussed below,
2 Defendants' motion to dismiss is GRANTED.

3 BACKGROUND

4 The Court summarized the facts alleged by Plaintiff as
5 follows:

6 In his first amended complaint Plaintiff alleges
7 that on August 2, 2004, he was placed in administrative
8 segregation (ad seg) based on allegations of sexual
9 misconduct with other inmates by a confidential
10 informant. Plaintiff was placed in ad seg for security
11 reasons while the accusations were investigated. When
12 Plaintiff was moved into ad seg his property was removed
13 from his cell but he was not issued any receipts.
14 Subsequently, Plaintiff received only part of his
15 property back.

16 On August 12, 2004, Plaintiff was told there was not
17 enough evidence to support the allegations of misconduct
18 against him and he was moved to a cell in Facility B.
19 The prior occupant of the cell had been removed by force
20 earlier in the day and officers had used pepper spray
21 during the process. Plaintiff alleges that all of the
22 items in the cell, including the bedding and the walls,
23 were covered in toxic residue but he and his cellmate
24 were refused cleaning supplies and new mattresses for
25 several days. As a result, Plaintiff suffered from an
26 "unbearable burning" of his eyes, nose, throat and
27 genitalia.

28 Plaintiff attempted to file administrative appeals
on the matters of his missing property and exposure to
the pepper spray but the appeals coordinators repeatedly
returned his appeals to him for technical reasons and
would not send them to the next level for review. Thus,
Plaintiff concedes that he has not exhausted his
administrative remedies but faults the Defendants for his
failure to do so.

(Jan. 19, 2006 Order at 1-2.)

DISCUSSION

29 The Prison Litigation Reform Act of 1995 (PLRA) amended 42
30 U.S.C. § 1997e to provide that "[n]o action shall be brought with
31 respect to prison conditions under [42 U.S.C. § 1983], or any other
32 Federal law, by a prisoner confined in any jail, prison, or other

1 correctional facility until such administrative remedies as are
2 available are exhausted." 42 U.S.C. § 1997e(a). Although once
3 within the discretion of the district court, exhaustion in prisoner
4 cases covered by § 1997e(a) is now mandatory. Porter v. Nussle,
5 534 U.S. 516, 524 (2002). All available remedies must now be
6 exhausted; those remedies "need not meet federal standards, nor
7 must they be 'plain, speedy, and effective.'" Id. (citation
8 omitted). Even when the prisoner seeks relief not available in
9 grievance proceedings, notably money damages, exhaustion is a
10 prerequisite to suit. Id.; Booth v. Churner, 532 U.S. 731, 741
11 (2001). Similarly, exhaustion is a prerequisite to all prisoner
12 suits about prison life, whether they involve general circumstances
13 or particular episodes, and whether they allege excessive force or
14 some other wrong. Porter, 534 U.S. at 532.

15 The PLRA's exhaustion requirement cannot be satisfied "by
16 filing an untimely or otherwise procedurally defective
17 administrative grievance or appeal." Woodford v. Nqo, 548 U.S. 81,
18 ___, 126 S. Ct. 2378, 2382 (2006). "The text of 42 U.S.C.
19 § 1997e(a) strongly suggests that the PLRA uses the term
20 'exhausted' to mean what the term means in administrative law,
21 where exhaustion means proper exhaustion." Id. at 2387.
22 Therefore, the PLRA exhaustion requirement requires proper
23 exhaustion. Id. "Proper exhaustion demands compliance with an
24 agency's deadlines and other critical procedural rules because no
25 adjudicative system can function effectively without imposing some
26 orderly structure on the course of its proceedings." Id. at 2386
27 (footnote omitted); Jones v. Bock, 127 S. Ct. 910, 922-23 (2007)
28 (compliance with prison grievance procedures is required by the

1 PLRA to "properly exhaust"). The level of detail necessary in a
2 grievance to comply with the grievance procedures will vary from
3 system to system and claim to claim, but it is the prison's
4 requirements, and not the PLRA, that define the boundaries of
5 proper exhaustion. Jones, 127 S. Ct. at 923.

6 The State of California provides its prisoners the right to
7 appeal administratively "any departmental decision, action,
8 condition or policy perceived by those individuals as adversely
9 affecting their welfare." Cal. Code Regs. tit. 15, § 3084.1(a).
10 It also provides them the right to file appeals alleging misconduct
11 by correctional officers and officials. Id. § 3084.1(e). In order
12 to exhaust available administrative remedies within this system, a
13 prisoner must proceed through several levels of appeal:
14 (1) informal resolution, (2) formal written appeal on a 602 inmate
15 appeal form, (3) second level appeal to the institution head or
16 designee, and (4) third level appeal to the Director of the
17 California Department of Corrections and Rehabilitation (CDCR).
18 Barry v. Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997) (citing
19 Cal. Code Regs. tit. 15, § 3084.5). A final decision from the
20 Director's level of review satisfies the exhaustion requirement
21 under § 1997e(a). Id. at 1237-38.

22 Non-exhaustion under § 1997e(a) is an affirmative defense
23 which should be brought by defendants in an unenumerated motion to
24 dismiss under Federal Rule of Civil Procedure 12(b). Wyatt v.
25 Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). However, a complaint
26 may be dismissed by the court for failure to exhaust if a prisoner
27 "conce[des] to nonexhaustion" and "no exception to exhaustion
28 applies." Id. at 1120.

1 In the present case, Defendants correctly raise non-exhaustion
2 in an unenumerated motion to dismiss. Defendants argue that
3 Plaintiff did not properly exhaust his administrative remedies
4 prior to the filing of his complaint as mandated by § 1997e(a).

5 Plaintiff alleges that he was unable to submit a 602 inmate
6 appeal relating to his deliberate indifference claim because SVSP's
7 Appeals Coordinators "refused to accept the plaintiff's appeals."
8 (Am. Compl. at 8.)² Plaintiff claims that he "sent his appeals on
9 the following dates, 29 Aug. 2004, 24 Sept. 2004, 27 Oct. 2004, and
10 on 18 Nov., 2004" but "the appeal was never returned or filed after
11 the 18th November 2004 submission." (Id.)

12 The record shows that Plaintiff filed a 602 appeal form dated
13 August 29, 2004³ relating to his ad seg placement, pepper spray
14 exposure, and lost property. (Apr. 18, 2007 Opp'n Attach., 602
15 Appeal Form dated August 29, 2004.)⁴ The 602 appeal form was
16 stamped "DELIVERED" on September 24, 2004, October 5, 2004 and
17 October 27, 2004, and it was stamped "REC'D" on August 27, 2004,
18 October 6, 2004 and September 28, 2004. (Id.)

19 On August 27, 2004, Plaintiff's 602 appeal was screened out by
20 D. M. Mantel, former SVSP Appeals Coordinator. (Am. Compl. Ex.
21 "Appeals," First Notice on Inmate/Parolee Appeals Screening Form at

22
23 ² Certain pages of Plaintiff's amended complaint are not
24 numbered; therefore, the Court has renumbered it starting with "1" on
the first page.

25 ³ Plaintiff post-dated his appeal because the record shows that
26 the 602 appeal was received on August 27, 2004. Plaintiff concedes
that this was an "error in date or filing on behalf of the Plaintiff."
(Jan. 22, 2007 Opp'n at 3.)

27
28 ⁴ Plaintiff's motion to submit exhibits in opposition to
Defendants' motion to dismiss (docket no. 86) is GRANTED.

1 "42" and "58.")⁵ According to Mantel, Plaintiff's 602 appeal was
2 being returned to him because it was "unclear" and it "contain[ed]
3 more than 1 additional page." (Id.) Mantel also instructed
4 Plaintiff to "be brief." (Id.) The Inmate/Parolee Appeals
5 Screening Form was delivered to Plaintiff on September 24, 2004,
6 and his 602 appeal form was returned to him on that same date.
7 (Id.)

8 On September 24, 2007, Plaintiff resubmitted his 602 appeal
9 and attached a memo stating, "all supporting documents have been
10 remove [sic] per the oder [sic] of the Appeals Coordinator CC II
11 D.M. Mantel." (Am. Compl. Ex. "Appeals," Pl.'s Sept. 24, 2007 Memo
12 at "45" and "60.")

13 On September 28, 2004, Mantel responded with a two-page
14 memorandum relating to Plaintiff's "multiple appeals." (Am. Compl.
15 Ex. "Appeals," Mantel's Sept. 28, 2004 Memo at "45" - "46.")
16 Referring to the resubmitted 602 appeal, Mantel noted:

17 602 #1 is a multi issue appeal.
18 Part 1 is re: ASU⁶ placement.
19 Part 2 is re: property.
20 Part 3 is re: the condition of the cell in ASU
when you arrived.

21 You must limit 1 issue per 602.
22 (Id. at "45" (footnote added).)

23 On October 6, 2004 and November 1, 2004, Mantel issued second

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25 ⁵ The page numbers written on Plaintiff's exhibits are inaccurate
and, at times, illegible. Furthermore, Plaintiff sometimes puts two
26 page numbers for each document. Therefore, the Court will note both
page numbers if they are legible.

27 ⁶ ASU stands for the Administrative Segregation Unit.
28

1 and third notices on the Inmate/Parolee Appeals Screening Form,
2 stating that Plaintiff's 602 appeal was being returned to him
3 because, in addition to the reasons in the first notice, the 602
4 appeal "contain[ed] more than 1 issue."⁷ (Am. Compl. Ex.
5 "Appeals," Second and Third Notices on Inmate/Parolee Appeals
6 Screening Form at "47" and "61.") Mantel added, "Insults are not
7 necessary. Please follow directions." (Id.) The second and third
8 notices were delivered to Plaintiff on October 27, 2004 and
9 November 17, 2004, respectively.⁸ (Id.)

10 Plaintiff alleges that on October 27, 2004, he filed a
11 separate 602 appeal form for each of his claims. He attached a
12 memo to the appeals, stating:

13 The enclosed documents are being returned to your office
14 as instructed. I have signed all of the documents but
15 they have not been dated due to you did not make it clear
16 as to what date you want to file the Appeals. I also
17 have enclosed the supporting documents as well. You can
18 use what you want to use and return what is not needed.
19 Aply [sic] the supporting documents as needed, they have
20 been provided for you.

21 This is the best way I see fit to have my Appeals filed
22 and addressed.

23 (Apr. 18, 2007 Opp'n Attach., Memo dated October 27, 2004.) The

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29 ⁷ It is not clear from the record which reasons were included in
30 the second notice and which were in the third notice.

31 ⁸ The Court notes that the Inmate/Parolee Appeals Screening Form
32 also has a received stamp, "REC'D NOV - 1 2004." (Am. Compl. Ex.
33 "Appeals," Inmate/Parolee Appeals Screening Form at "47" and "61.")
34 The other screening form delivered to Plaintiff on September 24, 2004
35 has no received stamp. (Id., Inmate/Parolee Appeals Screening Form
36 at "42" and "58.") The parties do not explain this inconsistency, and
37 there is no declaration from Mantel explaining what was received on
38 November 1, 2004.

1 memo was stamped "REC'D NOV - 1 2004."⁹ (Id.) One of the three
2 attached 602 inmate appeal forms relates to Plaintiff's deliberate
3 indifference claim, and it is dated October 27, 2004. (Apr. 18,
4 2007 Opp'n Attach., 602 Appeal Form (relating to the Aug. 13, 2004
5 incident) dated October 27, 2004.) There are no "DELIVERED" or
6 "REC'D" stamps on this 602 appeal form. (Id.) Plaintiff claims
7 that his appeal was "rejected by D. M. Mantel and/or T. Variz."
8 (Opp'n at 4.)

9 On November 18, 2004, Plaintiff resubmitted his appeals and
10 directed the Appeals Coordinator to "attach the supporting
11 documents as you see fit and return what you don't need for the
12 appeal issue." (Am. Compl. Ex. "Appeals," Pl.'s letter to Appeals
13 Office dated November 18, 2004 at "72.") Plaintiff claims "the
14 appeal was never returned or filed after the 18th November 2004
15 submission." (Am. Compl. at 8.)

16 Plaintiff alleges he "submitted his complaint with the Warden
17 of the institution on November 21, 2004." (Id.; Am. Compl. Ex.
18 "Exhaustion," Plaintiff's Nov. 21, 2004 letter to "J. Woodward" at
19 "6.") However, he alleges that "the appeals were never addressed
20 nor filed or returned from this office, or forwarded to the Appeals
21 office." (Am. Compl. at 8.)

22 Plaintiff also sent copies of the appeals to CDCR Chief of the
23 Inmate Appeals Branch N. Grannis on November 24, 2004. (Am. Compl.
24 at 8.) Plaintiff claims that on February 5, 2005, Grannis
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26 ⁹ The Court notes that the "REC'D NOV - 1 2004" stamp on
27 Plaintiff's memo is identical to the "REC'D NOV - 1 2004" stamp on the
Inmate/Parolee Appeals Screening Form. (Am. Compl. Ex. "Appeals,"
28 Inmate/Parolee Appeals Screening Form at "47" and "61.")

1 "returned the appeal" and that it "was not addressed" because
2 "[t]he Chief of Inmate Appeals refused to accept the plaintiffs
3 [sic] appeals." (Am. Compl. at 8.) The record shows that Grannis
4 sent Plaintiff a letter dated February 5, 2005 stating, "[t]his
5 appeal should be submitted directly to the Appeals Coordinator for
6 review and appropriate action." (Am. Compl. Ex. "Exhaustion,"
7 Grannis's February 5, 2005 letter to Plaintiff at "7.")

8 Plaintiff filed a complaint with the California Victim
9 Compensation and Government Claims Board (Board) on February 24,
10 2005. (Am. Compl. at 8; Am. Compl. Ex. "Exhaustion," Pl.'s Board
11 Claim Form at "26" to "28.") Plaintiff claims that his Board Claim
12 is "still pending." (Am. Compl. at 8.) In a letter dated March
13 14, 2005, the Board stated, "Board staff recommends the claim be
14 rejected because the claim raises complex issues of fact and law
15 that should be resolved through formal legal action." (Am. Compl.
16 Ex. "Exhaustion," Board's Response dated Mar. 14, 2005 at "30.")
17 In a letter from the Board dated April 21, 2005, Plaintiff was
18 informed that there would be a Board meeting about his claim on May
19 2, 2005 and that he would be receiving written notification of the
20 Board's decision within three weeks of the meeting. (Am. Compl.
21 Ex. "Exhaustion," Board's Response dated Apr. 21, 2005.) There is
22 nothing further in the record informing the Court of the Board's
23 decision.

24 On March 27, 2005, Plaintiff sent a letter to the CDCR, ATTN:
25 "J. Woodward," stating that his claim has "not been addressed or
26 resolved" and he was giving notice that Plaintiff was going to sue
27 "J. Woodward," the CDCR, and SVSP for "not handling the issues that
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1 remains [sic] unsolved." (Am. Compl. Ex. "Exhaustion," Pl.'s
2 letter to "J. Woodward" dated Mar. 27, 2005 at "23.")

3 In support of their motion to dismiss, Defendants have filed
4 declarations by Grannis as well as SVSP Appeals Coordinators Eloy
5 Medina and T. Variz.¹⁰

6 According to Variz, "[t]he Appeal's Coordinator's Office at
7 Salinas Valley State Prison has no record that inmate Brown
8 submitted the inmate appeal that is attached to his Complaint and
9 dated October 27, 2004. . . ." (Variz Decl. ¶ 5.) He adds, "I do
10 not believe that inmate Brown actually submitted this appeal to our
11 office because it is missing the date stamp and category number
12 that we put on all appeals submitted to our office, even the ones
13 that are screened out." (Id.)

14 Grannis reviews all appeals filed with the Director, the
15 highest level of appeal available to California prisoners.
16 (Grannis Decl. ¶¶ 1, 2.) Grannis attests that a search of the
17 database containing records of all administrative appeals filed
18 with the Director was conducted and that the search produced proof
19 that Plaintiff has exhausted a total of seventeen inmate appeals.
20 (Id. at ¶ 3.) Of these appeals, Grannis states that Plaintiff has
21 exhausted three inmate appeals arising out of SVSP in 2004. (Id.
22 at ¶ 4.) According to Grannis, "[n]one of the three exhausted
23 inmate appeal deal with Plaintiff's exposure to pepper spray on or
24 around August 13, 2004." (Id.)

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26 _____
27 ¹⁰ Defendants have only attached Medina's declaration to their
28 renewed motion to dismiss; therefore, the Court refers to Grannis's
and Variz's declarations previously submitted with the original motion
to dismiss (docket nos. 51, 52).

1 The Court finds that Plaintiff has failed to demonstrate that
2 he has exhausted his administrative remedies with respect to his
3 deliberate indifferent claim prior to filing this suit. Even
4 accepting Plaintiff's allegations as true, he failed to complete
5 the administrative review process in accordance with SVSP's
6 applicable procedural rules.

7 Plaintiff's initial appeal dated August 29, 2004 relating to
8 his deliberate indifference claim failed to comply with SVSP's
9 rules for grievances because it contained more than one issue.
10 While Plaintiff claims that on October 27, 2004 he resubmitted the
11 appeal containing only his deliberate indifference claim, the
12 actual 602 appeal form lacks a received date stamp or other
13 acknowledgment that it was received or processed by Defendants or
14 other SVSP staff. In contrast, multiple stamps appear on the
15 August 29, 2004 appeal form, which was acknowledged as having been
16 received by SVSP prison officials. The Court notes that the memo
17 attached to the October 27, 2004 appeal form has a received stamp,
18 but that stamp appears to be traced and does not look like the
19 received stamps on Plaintiff's August 29, 2004 appeal form.
20 Furthermore, the declarations from SVSP prison officials state that
21 there is no record that his October 27, 2004 602 appeal was ever
22 received.

23 Even assuming that Plaintiff's October 27, 2004 appeal was
24 received and did satisfy the requirements at the informal level of
25 review, Plaintiff does not allege or establish that he exhausted
26 the three remaining levels of review applicable to his claims.
27 Plaintiff admits that after receiving no response to his appeal, he
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1 filed complaints with Grannis, the Board and the CDCR. Even after
2 being directed to go through SVSP's administrative grievance
3 process by Grannis, he did not do so. Accordingly, the Court finds
4 that Plaintiff failed to exhaust his deliberate indifference claim
5 and his amended complaint must be DISMISSED WITHOUT PREJUDICE in
6 its entirety.

7 CONCLUSION

8 For the foregoing reasons,

9 1. Defendants' Motion to Dismiss (docket no. 72) is GRANTED.
10 Plaintiff's amended complaint is DISMISSED WITHOUT PREJUDICE for
11 failure to exhaust. Plaintiff may refile his claim if he is able
12 to exhaust his administrative remedies in compliance with Title 15
13 of the California Code of Regulations § 3084.

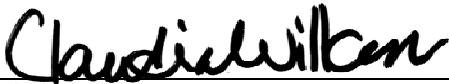
14 2. Plaintiff's motion to submit exhibits in opposition to
15 Defendants' motion to dismiss (docket no. 86) is GRANTED.

16 3. The Clerk of the Court shall enter judgment in accordance
17 with this Order, terminate all pending motions as moot, including
18 the document entitled "Petitioner's Motion for Acknowledgment
19 and/or Certificate of Service Receipts" (docket no. 82), and close
20 the file.

21 4. This Order terminates Docket nos. 72, 82 and 86.

22 IT IS SO ORDERED.

23 DATED: 3/31/08


24 CLAUDIA WILKEN
25 United States District Judge
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27
28

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

BROWN,

Plaintiff,

Case Number: CV05-01423 CW

1

SALINAS VALLEY STATE PRISON et al.

Defendant.

CERTIFICATE OF SERVICE

SALINAS VALLEY STATE PRISON et al.

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 31, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Sara Ugaz
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455 Golden Gate Avenue
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William Odessa Brown K-93463
CAL
P.O. Box 5002
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Dated: March 31, 2008

Richard W. Wiekling, Clerk
By: Sheilah Cahill, Deputy Clerk